A

Institute of Technology Petronas Sdn Bhd/Universiti Teknologi Petronas v Amirul Fairuz bin Ahmad

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01(A)-122–02 OF 2020
HANIPAH FARIKULLAH, AZIZAH NAWAWI AND HADHARIAH SYED ISMAIL JJCA
14 FEBRUARY 2023
C [2023] MLJU 253

Labour Law — Employment — Termination — Termination of employee by University — Misconduct of fraudulent and dishonest dental claim by employee — Admission by employee — University terminated employee despite recommendation by panel of domestic inquiry that employee be given reminder and penalty — Industrial Court held that employee's dismissal was without just cause and excuse — High Court upheld Industrial Court's award — Whether act of misconduct proven — Whether Industrial Court erred in relying solely to notes of proceedings of domestic inquiry in finding that misconduct was not proven — Whether employee's termination was with just cause and excuse — Industrial Relations Act 1967 s 20

The respondent who was the employee of Universiti Teknologi Petronas ('the appellant/the University') was charged with two charges of misconduct in relation to the respondent's wife dental claim under the respondent's name. The first misconduct was for fraudulent and dishonest dental claim, a misconduct under the General Rules, Part IV, section 1, subsection 1.3(v) and (vi) of the PETRONAS/ITPSB Code of Conduct & Business Ethics ('CoBE') whereas the second charge was in respect of the respondent's conduct in instructing the personnel at Klinik Pergigian Mardhiah to prepare the receipt under his name. The respondent admitted to have committed the misconduct but stated that it was unintentional as the claim was made after three months and he had forgotten about this receipt that he was not supposed to claim. At the end of the domestic inquiry, the panel decided to drop the second charge but decided that the first charge was not a fraudulent case and further stated that the respondent did submit an unentitled claim. Therefore, the panel recommended no dismissal but a 'reminder, penalty'. Despite such recommendation, considering the seriousness of the misconduct, the appellant had decided to terminate the respondent. The respondent's appeal to the University was to no avail. The matter was brought to the Industrial court pursuant to s 20 of the Industrial Relations Act 1967 ('the IRA'). Based on the notes of proceedings of the domestic inquiry which were held to be valid and accurate, the Industrial Court had decided that the respondent's dismissal was

without just cause or excuse ('the award'). On appeal, the High Court agreed with the Industrial Court's award, hence, the present appeal. The issues arose were: (a) whether an act of misconduct had been proven; and (b) whether subsection 1.3(v) of CoBE must be read conjunctively with subsection 1.3(vi), and therefore the 'serious act of misconduct' must encompass both fraud in subsection 1.3(v) and dishonest conduct in subsection 1.3(vi).

Held, allowing the appellant's appeal, setting aside the order of the High Court with costs, and granting an order for the award to be quashed:

(1) In the present case, the duty of the Industrial Court was to determine whether the misconduct complained of by the University had been established, and whether the proven misconduct constituted just cause or excuse for the dismissal. The onus to prove, on a balance of probabilities that the dismissal was for just cause or excuse, lay with the University. It was also important for the Industrial Court to determine whether misconduct had been made out based on the evidence presented at the trial. The Industrial Court could not rely on the notes of proceedings of the domestic inquiry only to decide whether a prima facie case had been established (see paras 32–33).

(2) The Industrial Court had committed an error in law when it relied heavily on the findings of the domestic inquiry panel to make a finding that the University had failed to establish the charge of misconduct, instead of making a finding based on the evidence presented before it. It was an established principle that when the Industrial Court hearing the reference under s 20 of the IRA, it was by way of rehearing, to hear the case 'de novo', regardless of whether the domestic inquiry was held or otherwise. The Industrial Court and the learned High Court judge fell into error when a substantial part of their judgments dealt with the issue of the validity of the domestic Inquiry and made a decision that based on the findings of the inquiry, the University had failed to establish the first charge against the respondent. The court therefore found that the Industrial Court was procedurally wrong for not considering the evidence at the trial, which warranted appellate intervention (see paras 34, 39, 43, 49–50 & 54).

(3) The court was of the opinion that because of the punctuation semicolon and the word 'and', subsection 1.3(v) must be read disjunctively from subsection 1.3(vi). Therefore the 'serious act of misconduct' could either be fraud in subsection 1.3(v) or dishonest conduct in subsection 1.3(vi). Bearing in mind that a fraudulent act was distinct from a dishonest act, both were serious independent acts of misconduct which may form the basis for a dismissal. As such, the learned High Court judge had made an erroneous finding that for the first charge to be sustainable, the appellant must establish both fraud and dishonest conduct. In the present case, the

Industrial Court had accepted [c626]rsquo;the domestic inquiry's findings that fraud was not established. This contradicted the learned judge's finding that the domestic inquiry had found the respondent's conduct in submitting a claim for which he was unentitled to, tantamount to a finding that 'R1 had been found to be dishonest or conducting oneself in such a manner as to lay oneself to open suspicion of dishonesty ...'. Therefore, the court found that the first charge in relation to dishonest conduct in subsection 1.3(vi) had been proven against the respondent (see paras 64–65).

(4) The fact that the respondent had filed the claim in the claim system with the knowledge that the receipt was for the dental treatment for his wife, clearly showed a dishonest act by the respondent. Once the respondent showed dishonesty or lack of integrity, the trust and confidence reposed in him by the University/employer could no longer subsisted. In the circumstances, it was reasonable for the University to dismiss the respondent, as integrity was the foundation of education, the very purpose of the University. As such, the court found that the respondent's dismissal was with just cause or excuse (see paras 68 & 75–76).

[Bahasa Malaysia summary

Responden yang merupakan pekerja Universiti Teknologi Petronas ('perayu/Universiti') didakwa atas dua pertuduhan salah laku berhubung tuntutan rawatan pergigian isteri responden di bawah nama responden. Salah laku pertama adalah untuk tuntutan pergigian palsu dan tidak jujur, salah laku di bawah Peraturan Am, Bahagian IV, seksyen 1, subseksyen 1.3(v) dan (vi) Tatakelakuan & Etika Perniagaan PETRONAS/ITPSB ('CoBE') manakala pertuduhan kedua adalah berhubung kelakuan responden mengarahkan kakitangan di Klinik Pergigian Mardhiah menyediakan resit di bawah namanya. Responden mengaku melakukan salah laku tersebut tetapi menyatakan ia tidak disengajakan kerana tuntutan tersebut dibuat selepas tiga bulan dan dia terlupa tentang resit ini yang tidak sepatutnya dituntut. Pada akhir siasatan domestik, panel memutuskan untuk menggugurkan pertuduhan kedua tetapi memutuskan bahawa pertuduhan pertama bukanlah kes penipuan dan seterusnya menyatakan bahawa responden sememangnya telah mengemukakan tuntutan tanpa hak. Oleh itu, panel mengesyorkan tiada pemecatan tetapi 'peringatan, penalti'. Walaupun syor sedemikian yang diberikan, mengambil kira keseriusan salah laku tersebut, perayu telah memutuskan untuk memberhentikan responden. Rayuan responden kepada Universiti tidak berjaya. Perkara tersebut telah dibawa ke Mahkamah Perusahaan menurut s 20 Akta Perhubungan Perusahaan 1967 ('APP'). Berdasarkan nota prosiding siasatan domestik yang dianggap sah dan tepat, Mahkamah Perusahaan telah memutuskan bahawa pemecatan responden adalah tanpa sebab atau alasan yang adil ('award tersebut'). Atas rayuan, Mahkamah Tinggi bersetuju dengan award Mahkamah Perusahaan, justeru,

rayuan semasa. Isu-isu yang timbul ialah: (a) sama ada perbuatan salah laku telah dibuktikan; dan (b) sama ada subseksyen 1.3(v) CoBE mesti dibaca bersama-sama dengan subseksyen 1.3(vi), dan oleh itu 'tindakan salah laku yang serius' mesti merangkumi kedua-dua penipuan dalam subseksyen 1.3(v) dan kelakuan tidak jujur dalam subseksyen 1.3(vi).

Diputuskan, membenarkan rayuan perayu, mengenepikan perintah Mahkamah Tinggi dengan kos, dan memberikan perintah agar award tersebut dibatalkan:

(1) Dalam kes ini, tanggungjawab Mahkamah Perusahaan adalah untuk menentukan sama ada salah laku yang diadukan oleh Universiti telah terbukti, dan sama ada salah laku yang terbukti tersebut merupakan sebab atau alasan yang adil untuk pemecatan tersebut. Tanggungjawab untuk membuktikan, atas imbangan kebarangkalian bahawa pemecatan tersebut adalah atas sebab atau alasan yang adil, terletak pada Universiti. Adalah penting juga bagi Mahkamah Perusahaan untuk menentukan sama ada salah laku telah dibuktikan berdasarkan keterangan yang dikemukakan dalam perbicaraan. Mahkamah Perusahaan tidak boleh bergantung hanya pada nota prosiding siasatan domestik sahaja untuk memutuskan sama ada kes prima facie telah dibuktikan (lihat perenggan 32–33).

(2) Mahkamah Perusahaan telah melakukan kekhilafan undang-undang apabila ia terlalu bergantung kepada dapatan-dapatan panel siasatan domestik untuk membuat penemuan bahawa Universiti telah gagal untuk membuktikan pertuduhan salah laku, dan bukannya membuat keputusan berdasarkan keterangan yang dikemukakan di hadapannya. Ia merupakan prinsip yang telah ditetapkan bahawa apabila Mahkamah Perusahaan mendengar rujukan di bawah s 20 APP, ia adalah melalui perbicaraan semula, untuk mendengar kes 'de novo', tidak kira sama ada siasatan domestik telah dibuat atau sebaliknya. Mahkamah Perusahaan dan hakim Mahkamah Tinggi yang bijaksana telah terkhilaf apabila sebahagian besar penghakiman mereka menangani isu kesahihan siasatan domestik dan membuat keputusan bahawa berdasarkan penemuan siasatan tersebut, Universiti telah gagal untuk membuktikan pertuduhan pertama terhadap responden. Oleh itu, mahkamah mendapati bahawa Mahkamah Perusahaan adalah salah dari segi prosedur kerana tidak mempertimbangkan keterangan pada perbicaraan, yang mana ini memerlukan campur tangan rayuan (lihat perenggan 34, 39, 43, 49–50 & 54).

(3) Mahkamah berpendapat bahawa disebabkan tanda baca koma bertitik dan perkataan 'dan', subseksyen 1.3(v) mesti dibaca secara berasingan daripada subseksyen 1.3(vi). Oleh itu 'tindakan salah laku yang serius' boleh merujuk kepada sama ada penipuan dalam subseksyen 1.3(v) atau

kelakuan tidak jujur dalam subseksyen 1.3(vi). Mengingati bahawa tindakan penipuan adalah berbeza daripada kelakuan tidak jujur, kedua-duanya adalah tindakan salah laku berbeza yang serius yang boleh menjadi asas untuk pemecatan. Oleh yang demikian, hakim Mahkamah Tinggi yang bijaksana telah membuat dapatan yang silap bahawa bagi memastikan pertuduhan pertama tersebut dibuktikan, perayu mesti membuktikan kedua-dua penipuan dan kelakuan tidak jujur. Dalam kes ini, Mahkamah Perusahaan telah menerima penemuan siasatan domestik bahawa penipuan tidak dibuktikan. Ini bercanggah dengan dapatan hakim yang bijaksana bahawa siasatan domestik telah mendapati kelakuan responden dalam mengemukakan tuntutan yang dia tidak berhak, sama seperti dapatan bahawa 'R1 had been found to be dishonest or conducting oneself in such a manner as to lay oneself to open suspicion of dishonesty ...'. Oleh itu, mahkamah mendapati bahawa pertuduhan pertama berhubung kelakuan tidak jujur dalam subseksyen 1.3(vi) telah dibuktikan terhadap responden (lihat perenggan 64–65).

(4) Hakikat bahawa responden telah memfailkan tuntutan dalam sistem tuntutan dengan pengetahuan bahawa resit tersebut adalah untuk rawatan pergigian isterinya, jelas menunjukkan perbuatan tidak jujur responden. Apabila responden menunjukkan ketidakjujuran atau tidak berintegriti, kepercayaan dan keyakinan yang diberikan oleh Universiti/majikan kepadanya tidak dapat bertahan lagi. Dalam keadaan tersebut, adalah munasabah bagi Universiti untuk memecat responden, kerana integriti adalah asas kepada pendidikan, tujuan bagi sesebuah Universiti. Oleh yang demikian, mahkamah mendapati bahawa pemecatan responden adalah dengan sebab atau alasan yang adil (lihat perenggan 68 & 75–76).]

Cases referred to

British Leyland UK Ltd v Swift [1981] IRLR 91, FC (refd)

Bumiputra Commerce Bank Bhd v Mahkamah Persekutuan Malaysia & Anor [2004] 7 MLJ 441, HC (refd)

Dato' Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong [1986] 2 MLJ 112; [1986] 1 CLJ 377; [1986] CLJ Rep 89, SC (refd)

Ganesan a/l G Suppiah v Mount Pleasure Corp Sdn Bhd [1997] MLJU 148; [1998] 1 CLJ 637, HC (refd)

Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor [2014] 6 MLJ 305; [2014] 8 CLJ 821, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481; [1997] 1 CLJ 665, CA (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537, FC (refd)

Plaintree Wood Products Sdn Bhd lwn Mahkamah Perusahaan Malaysia dan satu lagi [2005] MLJU 672; [2005] 1 LNS 283, HC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)
Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129; [2002] 3 CLJ 314, CA (refd)
Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753; [1995] 1 MLRA 412; [1995] 3 CLJ 344; [1995] 2 AMR 2145, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 16(l)
Industrial Relations Act 1967 s 20

Appeal from: *Institute of Technology Petronas Sdn Bhd/Universiti Teknologi Petronas v Amirul Fairuz bin Ahmad & Anor* [2020] MLJU 420 (High Court, Ipoh)
Editorial Note: The respondent in this case appealed to the Federal Court through Civil Appeal No 01(f)-15–05 of 2022(A). On 11 May 2023, the Federal Court allowed the appeal with costs of RM100,000.

Ravichandran Selliah (with Tan Yee Nee) (S Ravichandaran & Anuar) for the appellant.
Raam Kumar (with Norleena Jamal) (KB Tan Kumar & Partners) for the respondent.

Azizah Nawawi JCA:

INTRODUCTION

[1] This appeal is against the decision of the learned High Court judge delivered on 20 January 2020, which had dismissed the appellant's application for a judicial review to quash the Industrial Court's Award No 802/2019 dated 27 February 2019.

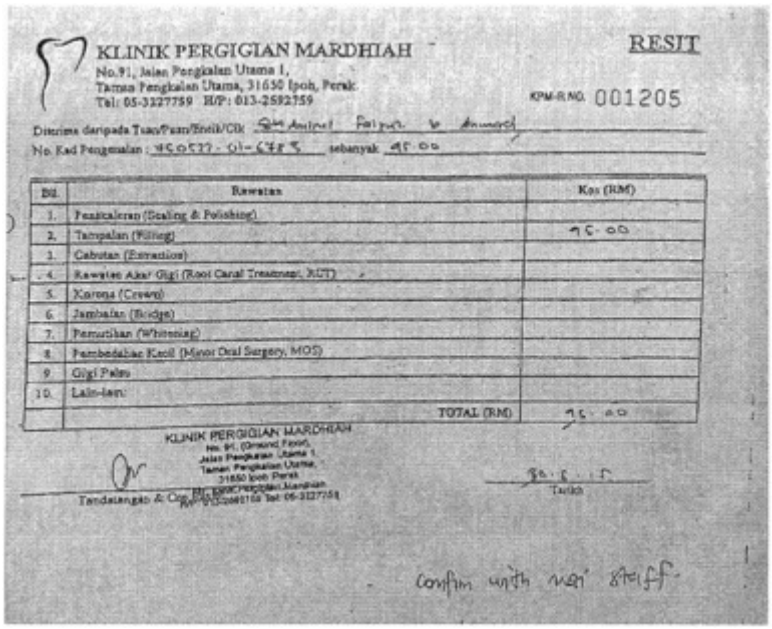
THE SALIENT FACTS

[2] The appellant ('university') is a private university established in 1997 and is a wholly-owned subsidiary of PETRONAS, a national oil and gas company.

[3] The respondent ('claimant') was employed by the university as an Executive at the Civil Engineering Department since 1 March 2007.

[4] The university was alerted by AIA, the University's Group Insurer, regarding one suspicious claim because the name printed on the receipt appears to have been altered.

[5] On the receipt, which triggered the disciplinary action against the claimant, is stated 'Sh' and was cancelled and appeared as 'Sh'. Upon cancelling the words Sh, the claimant's name appear in full as Amirul Fairuz b Ahmad.



KLINIK PERGIGIAN MARDHIAH
No.91, Jalan Pengkalan Utama 1,
Taman Pengkalan Utama, 31650 Ipoh, Perak.
Tel: 05-3227759 H/P: 013-2592759

RESIT

KPM-R.NO. 001205

Diterima daripada Tuan/Puan/Encik/Cik: Sh Amirul Fairuz b Ahmad
No. Kad Pengenalan: 950527-01-6285 sebanyak: 45.00

Bil.	Rawatan	Kos (RM)
1.	Pembersihan (Scaling & Polishing)	
2.	Tampalan (Filling)	75.00
3.	Cabutan (Extraction)	
4.	Rawatan Akar Gigi (Root Canal Treatment, RCT)	
5.	Korona (Crown)	
6.	Jambatan (Bridge)	
7.	Pemutihan (Whitening)	
8.	Pembedahan Kecil (Minor Oral Surgery, MOS)	
9	Gigi Palsu	
10.	Lain-lain:	
	TOTAL (RM)	75.00

KLINIK PERGIGIAN MARDHIAH
No. 91, (Ground Floor),
Jalan Pengkalan Utama 1,
Taman Pengkalan Utama,
31650 Ipoh Perak.

Tandatangan & Cop

30.5.15
Tarikh

Confirm with MOH staff.

[6] The university was alerted regarding the above-stated discrepancy on the receipt by AIA, vide its letter dated 15 September 2015, which clearly declined the claimant's claim for a reason 'Visit Details Could Not Be Validated'.

[7] Thereafter, the university received another letter from AIA, dated 22 September 2015, which clearly stated that AIA found out the claim made by the claimant was actually for a dental treatment received by the claimant's wife, Sharifah Noorhaliza.

[8] The senior manager of the university's Human Resources Department, Zamri Bin Yusof, who appeared as COW2 at the trial in the Industrial Court, commenced an investigation into the matter.

[9] Pursuant to the investigation, on 22 October 2015, the university served the claimant with a show cause letter informing him that he had been accused of two charges for misconduct. The two charges preferred against the claimant are as follows:

FIRST CHARGE

That you Amirul Fairuz bin Ahmad (Staff No: 128243), as senior Executive of Institute of Technology PETRONAS Sdn Bhd (ITPSB), on 5 August 2015 had made or attempted to make a fraudulent dental claim for a sum amounting to Ringgit Malaysia Ninety Five Only (RM95) when you submitted the AIA Member Outpatient Claim form dated 5 August 2015, despite the fact that you did not receive such treatment and that the treatment was instead received by your spouse, Sharifah Noorhaliza bt Syed Md Kamal, on 30 May 2015 at Klinik Pergigian Mardhiah, No 91, Jalan Pengkalan Utama 1, Taman Pengkalan Utama, 31660 lpoh, Perak.

You have therefore committed an act of serious misconduct as found under General Rules, Part IV Section 1 Subsection 1.3(v): theft, fraud, misappropriation; and (vi) being dishonest or conducting oneself in such a manner as to lay oneself open to suspicion of dishonesty; of the PETRONAS/ITPSB Code of Conduct & Business Ethics (CoBE). In the event that you are found guilty of the alleged misconduct, you can be imposed with punishment as per Part IV Section 2 of CoBE.

SECOND CHARGE

That you, Amirul Fairuz bin Ahmad (Staff No:128243), as senior Executive of Institute of Technology PETRONAS Sdn Bhd (ITPSB), had instructed the personnel at Klinik Pergigian Mardhiah, No 91, Jalan Pengkalan Utama 1, Taman Pengkalan Utama, 31650 lpoh, Perak, to prepare the receipt (Receipt No: 001206) under your name, for a dental appointment received by your spouse Sharifah Noorhaliza bt Syed Md Kamal on 30 May 2015 to enable you to claim for such treatment from the company as provided for in the UTP Policy and Guidelines under Section 3, Compensation & Benefit, Subsection 3.2.2, part D.

You have therefore committed a serious misconduct as found under General Rules, Part IV Section 1 Subsection 1.3(vi): being dishonest or conducting oneself in such a manner as to lay oneself open to suspicion of dishonesty; (viii) negligence, neglect or dereliction of duty; and (xxi) any act which could adversely affect the image or reputation of Petronas; of the Petronas/lTPSB Code of Conduct & Business Ethics (CoBE). In the event that you are found guilty of the said misconduct, you can be imposed with punishment as per IV section 2 of CoBE.

[10] The claimant submitted his reply to the show cause letter in a letter dated 27 October 2015. In his letter, the claimant had, amongst others, admitted to have committed the misconduct as enumerated in the charges. The relevant part of the claimant's reply, is as follows:

I would like to apologize for the unintentionally and most regretful mistake that I have made. Apparently, the mistake was the result from me and it was unintentionally happened. On 30th May 2015, my wife has a dental treatment (filing) appointment at 'Klinik Pergigian Mardhiah'. Somewhere in the earlier month, i've also undergo the same treatment in the clinic. Upon my wife treatment, I requested the doctor to relook at the filing done on me because I still can feel the pain. The doctor confirmed that there is no infection in any of the filing and the pain may come from the mild fever that I suffer that day. There is no charge to me for that service. Anyhow, when I'm settling the bill for my wife, the clerk did give me

A an option to me to put the bill either under my wife's name or my name. With no intention to claim from AIA, and also since she is holding my IC, I allowed her to issue the receipt under my name. It's really doesn't cross my mind that I will proceed with the claim from AIA Health Services Sdn Bhd.

B I have a habit to just put any personal documents on my tray and only will process it when I have the time to do that. As a result from that, and after a few months, I was totally forgot about this particular receipt which I not supposed to claim.

C I agree the mistake was from my side as I did not careful enough in handling this matters. I should not allowed the receipts to be issued on my name at the first place and I was totally forgot about the receipt when i process all my pending claims in August 2015. If I really keen to proceed with false claims, definitely I will proceed with it immediately rather that to wait for almost 3 months to do so. In this case, I totally admit that I should be more alert and careful while handling this matter.

D **[11]** When the university found that the claimant's reply letter was not satisfactory, the university decided to commence a domestic inquiry on the said two charges against the claimant.

E **[12]** At the end of the hearing of the domestic inquiry, the Panel decided to drop the second charge but decided that the first charge is not a fraudulent case and further stated that the claimant did submit an unentitled claim. Hence the Panel recommended no dismissal but a 'reminder, penalty'.

F **[13]** However, the management of the university decided to terminate the claimant vide its letter dated 28 January 2016 due to the seriousness of the misconduct. The claimant was dismissed based on the first charge. In the same letter, the claimant was also informed that pursuant to Part IV, Section 4 of Company's Code of Conduct and Business Ethics ('CoBE'), the claimant has the right to appeal against the decision within 30 days of receipt of the said letter.

G

[14] Vide his letter dated 15 February 2016, the claimant appealed to the university against his dismissal.

H

[15] The claimant's appeal was dismissed by the university via a letter dated 5 June 2016.

I **[16]** Aggrieved by the university's decision to terminate his employment, the claimant lodged a complaint with the Ministry of Human Resources and his complaint was referred to the Industrial Court for determination.

DECISION OF THE INDUSTRIAL COURT

[17] In the Award No 802 of 2019, the Industrial Court held that the dismissal of claimant by the university was without just cause and excuse and had awarded back wages and compensation in lieu of reinstatement in the sum of RM181,171.69.

[18] In para 24 of the award, the Industrial Court had adopted and relied on the notes of inquiry during the domestic inquiry. In the domestic inquiry, the claimant had pleaded guilty to the two charges and that despite the fact that the actual dental treatment was received by the claimant's wife, he had requested for the receipt to be issued under his name.

[19] However, the Industrial Court then held that even though the claimant had admitted to the two charges, the Panel at the inquiry found him not guilty for the first charge and the second charge was withdrawn. As such, the Industrial Court was of the view that since domestic inquiry and notes of inquiry are valid and accurate, therefore the university had failed to prove the dismissal was with just cause and excuse (see paras 22–23, 25–28, 32 and 36 of the award).

[20] In para 30 of the award, the Industrial Court stated that based on the notes of inquiry at the domestic inquiry, the claimant did not display any intention to cheat the university as the claimant made the claim to AIA after three months.

[21] In para 34 of the award, the Industrial Court stated that the university had failed to produce concrete evidence to prove the claimant was guilty of the charges.

[22] In para 35 of the award, the Industrial Court held that the university had failed to adhere to the Panel's recommendation to impose 'Reminder, Penalty' instead of dismissal since the Panel found the claimant did not commit any fraud.

[23] In para 36–45 of the award, the Industrial Court held that it found the dismissal to be unjustified and awarded back wages and compensation to the claimant in lieu of reinstatement.

DECISION OF THE HIGH COURT

[24] The High Court judge had dismissed the university's application to quash the award of the Industrial Court and had affirmed the said award.

[25] The learned High Court judge held that the Industrial Court had correctly determined the prima facie case through the notes of proceedings of the domestic inquiry and that the Industrial Court had correctly decided that the domestic inquiry and the notes of proceeding are valid and accurate in adopting the decision by the Inquiry Panel that the claimant was not guilty of the charges (see para 54 of the High Court's decision).

[26] The learned High Court judge also held that the guilty plea by the claimant at the domestic inquiry was held to be a qualified plea by the Industrial Court and cannot be accepted. As such the Industrial Court was correct to conclude that the university had failed to prove the misconduct on the part of the claimant (see paras 65–72 of the High Court's decision).

[27] The learned High Court judge then concluded that the Industrial Court had complied with the principles laid down and therefore the award is not tainted with illegality, irrationality or procedural impropriety.

OUR DECISION

[28] In *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, the Federal Court set out the role of the court in an application for judicial review and the correct test to be applied in reviewing the findings of fact made by the Industrial Court, to be as follows:

> [15] ... Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.
>
> [16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post Rama Chandran cases have applied some brakes to the courts' liberal approach in *Rama Chandran*. The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.
>
> [17] The Federal Court, in *Petroliam National Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing

judge ought not to disturb findings of the Industrial Court unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.

[18] The Court of Appeal has in a number of cases held that where finding of facts by the Industrial Court are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235, *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2001] 1 CLJ 681, *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9, *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9). However, there are exceptions to this restrictive principle where:

(a) eliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality, or

(b) there is no evidence to support the conclusion reached (see *Swedish Motor Assemblies Sdn Bhd v Haji Md Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288).

[19] It is clear from the above authorities that the scope and ambit of *Rama Chandran* had been clearly explained and clarified. *Decided cases cited above have also clearly established that where the facts do not support the conclusion arrived at by the Industrial Court, or where the findings of the Industrial Court had been arrived at by taking into consideration irrelevant matters, and had failed to consider relevant matters into consideration, such findings are always amendable to judicial review*. (Emphasis added.)

[29] Bearing in mind the above principles distilled from the above authorities, we will now consider the university's appeal.

FUNCTION OF THE INDUSTRIAL COURT

[30] It is trite law that the function of the Industrial Court in dismissal cases on a reference under s 20 of the Industrial Relations Act is twofold, first, to determine whether the misconduct complained of by the employer has been established, and secondly, whether the proven misconduct constitutes just cause or excuse for the dismissal (see *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537 (FC)). In other words, the Industrial Court will have to ascertain whether the claimant had been dismissed, and if so, whether the dismissal was with or without just cause or excuse. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by certiorari by the High Court.

[31] The Federal Court in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753; [1995] 3 CLJ 344 held that:

On the authorities, we were of the view that the main and only function of the Industrial Court in dealing with a reference under s 20 of the Act (unless otherwise

lawfully provided by the terms of the reference) *is to determine whether the misconduct or irregularities complained of by the management as the grounds of dismissal were in fact committed by the workman, and if so, whether such grounds constitute just cause or excuse for the dismissal.* (Emphasis added.)

[32] Therefore, in the present case, the duty of the Industrial Court is to determine whether the misconduct complained of by the university has been established, and whether the proven misconduct constitutes just cause or excuse for the dismissal. It is also common ground that the onus to prove, on a balance of probabilities that the dismissal was for just cause or excuse, lies with the university (see *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314).

[33] It is also important for the Industrial Court to determine whether misconduct has been made out based on the evidence presented at the trial. It is also pertinent to note that the Industrial Court cannot rely on the notes of proceedings of the domestic inquiry only to decide whether a prima facie case has been established.

RELIANCE ON THE FINDINGS OF THE DOMESTIC INQUIRY

[34] We are of the considered opinion and we agree with the appellant/university that in the present case, the Industrial Court had failed to adequately consider the evidence presented at the trial before it in order to determine if the misconduct as per the first charge has been made out. In fact, what the Industrial Court did was to decide on the validity of the domestic inquiry and on the accuracy of the notes of inquiry, which was answered in the affirmative. Thereafter, the Industrial Court had relied on the notes of inquiry and decided that the university has failed to prove a prima facie case against the claimant.

[35] The Industrial Court, in adopting the above-stated approach, had placed its total reliance on the High Court decision in *Bumiputra Commerce Bank Bhd v Mahkamah Persekutuan Malaysia & Anor* [2004] 7 MLJ 441. In para 23 of the award, the Industrial Court made the following findings:

23. Pihak Universiti telah menjalankan satu siasatan dalaman pada 19 November 2015 sebelum memutuskan untuk menamatkan perkhidmatan pihak menuntut. Oleh itu adalah menjadi tugas mahkamah untuk meneliti nota-nota siasatan dalaman tersebut dan seterusnya mengesahkan sama ada siasatan dalaman tersebut dijalankan secara teratur dan sama ada nota-nota adalah tepat. lni adalah seperti yang telah dinyatakan oleh YA Raus Sharif HMT (YA ketika itu) dalam kes *Bumiputra Commerce Bank Bhd v Mahkamah Persekutuan Malaysia & Anor* [2004] 7 MLJ 441 iaitu:

... thus, I am of the view that the principle laid down in both cases cannot be said

to extend to instances where a domestic inquiry has been held.

As such, I am in agreement with the submissions of learned counsel for the applicant that, *where due inquiry has been held, the Industrial Court's jurisdiction is limited to considering whether there was a prima facie case against the employee …*

… Thus, I am of the view that in cases of this nature, the Industrial Court should first consider whether or not the domestic inquiry was valid and whether the inquiry notes are accurate. In the absence of such consideration and a finding on the validity of the domestic inquiry and accuracy of the inquiry notes, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry cannot be described as anything more than an error of law. (Emphasis added.)

[36] In relying on the proposition of law as stated in the *Bumiputra Commerce* case, the Industrial Court proceeded to determine whether the prima facie case against the claimant had been made out based on the notes of inquiry. In doing so, the Industrial Court ruled that the domestic inquiry was held in accordance with the rules of natural justice and its notes of inquiry are accurate:

25. Setelah meneliti nota-nota prosiding siasatan dalaman tersebut, mahkamah mendapati siasatan dalaman itu telah dijalankan dengan cara yang teratur dan sah, nota-nota adalah tepat dan menggambarkan sepenuhnya prosiding siasatan dalaman yang telah dijalankan serta telah mematuhi prinsip keadilah asasi. Walaupun pihak menuntut mengaku salah keatas pertuduhan yang dikenakan terhadapnya, panel telah meneruskan dengan sesi soal jawab bertujuan memberi peluang kepada pihak menuntut memberikan penjelasannya berkaitan dengan pertuduhan-pertuduhan tersebut. Oleh itu, mahkamah mendapati siasatan dalaman tersebut telah dijalankan dengan cara yang teratur dan sah, nota-nota adalah tepat dan menggambarkan sepenuhnya prosiding siasatan dalaman yang telah dijalankan serta telah mematuhi prinsip keadilan asas.

[37] Pursuant to the above, the Industrial Court then proceeded to adopt the decision held by the Inquiry Panel. According to the Industrial Court, the Panel had found the claimant not guilty of the first charge, whereas the second charge has been dropped. In para 32 in its award, the Industrial Court stated the following:

32. Panel siasatan dalaman di muka surat 22 COB-1 telah memberi keputusan bahawa '… this is not a fraudulent case …'. Haruslah diingat bahawa ahli-ahli panel adalah terdiri daripada mereka yang berpengalaman luas dan berkelayakan untuk menimbang segala keterangan yang dikemukakan semasa siasatan dalaman tersebut. Mereka layak membuat keputusan dengan menilai dan meneliti kepada keterangan-keterangan yang dikemukakan dalam siasatan dalaman tersebut. Dalam kes ini setelah menimbang keterangan dan dokumen yang dikemukakan, panel mendapati bahawa pihak menuntut tidak melakukan sebarang kesalahan trod. *Oleh itu, pihak universiti tidak mempunyai asas untuk menamatkan perkhidmatan pihak*

menuntut berdasarkan kepada keputusan panel siasatan dalaman kerana panel telahpun memutuskan pihak menuntut tidak melakukan kesalahan frod sepertimana yang dipertuduhkan keatasnya. (Emphasis added.)

[38] In para 34 of the award, the Industrial Court stated the following:

> 34. Sebagai kesimpulan, mahkamah mendapati pihak Universiti gagal mengemukakan keterangan yang kukuh untuk membuktikan pihak menuntut bersalah atas pertuduhan keatasnya. Panel siasatan dalaman yang dijalankan oleh Universiti juga mendapati pihak menuntut tidak melakukan kesalahan mengemukakan tuntutan rawatan pergigian secara frod. Dalam kes *Bank Bumiputra (M) Sdn Bhd v Noor Azhar Sakimin* [1996] 2 ILR 599, telah diputuskan seperti berikut:
>
> > They had made a finding of fact that the claimant had no dishonest intention to cheat or defraud the bank. They had also taken into account that except for this episode the claimant had an unblemished record. The Panel of inquiry did not recommend dismissal. They could do so if they wanted to. They suggested that the claimant suffer: a) reduction in salary, b) a final warning letter, c) transfer to another department. But the chairman did not accept that recommendation. Instead, he dismissed the claimant, singularly and purely upon the basis of the seriousness of misconduct ... Therefore the outright dismissal of the claimant by the bank was, to that extent without just cause or excuse.

[39] We are of the considered opinion that the Industrial Court had committed an error in law when it relied heavily on the findings of the domestic inquiry panel to make a finding that the university had failed to establish the charge of misconduct. The Industrial Court relied on the findings of the domestic inquiry that fraud has not been established, instead of making a finding based on the evidence presented before it.

[40] Likewise, the learned High Court judge had also decided that the Industrial Court is duty bound, under the *Bumiputra Commerce* case, to determine whether a prima facie case has been made from the notes of inquiry and not to proceed to hear the matter de novo:

> [48] The act of scrutinising the inquiry notes, therefore, is not for the Industrial Court to agree or disagree with the decision of that domestic inquiry. To subscribe to that view is akin to saying the Industrial Court is there as the rubber stamp. It certainly not. *The act of scrutinising the inquiry notes is to determine whether the domestic inquiry proceedings was held in accordance with law and valid. That is a decision to be made by the Industrial Court at prima facie stage. If the Industrial Court failed to make such consideration and finding, the Industrial Court's decision would be erroneous in law. Because the principle that is applicable to the Industrial Court is not to proceed to hear the matter de novo but to determine whether a prima facie case has been made against the employee*. This was the crux of the decision of Justice Raus Sharif in *Bumiputra Commerce* when he held:

> The Industrial Court's jurisdiction, in instances where a domestic inquiry had been held, was limited to considering whether there was a prima facie case against an employee. Thus, in the present case, the Industrial Court should have first considered whether or not the domestic inquiry was valid and the inquiry noted accurate. In the absence of such considerations, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry could not be described as anything more than an error of law. Accordingly, the conclusion of the Industrial Court that all charges preferred against the second respondent were not proven could be not supported and was, in fact, contrary to the clear evidence of the case. Since it was apparent from the records that the Industrial Court had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry, this court was compelled to exercise its powers of judicial review to issue an order of certiorari to quash the award.
>
> [49] Having set out the law and applicable principle, it is for me ask myself the question: *as there was a domestic inquiry held in the instant case, did the Industrial Court considered the notes of proceedings of that domestic inquiry and make a finding whether or not the notes were accurate and whether or not the domestic inquiry was valid?*
>
> [50] I had gone through the notes of proceedings of the Industrial Court and its written grounds of judgement and I am satisfied that the answer to the question is in the affirmative. (Emphasis added.)

[41] In para [70] , the learned High Court judge made the following finding:

> [70] The Inquiry Panel was unequivocally clear that they did not find R1 to have committed fraudulent act. That alone had killed the first charge against R1 ...

[42] From the above, it is clear that the High Court also took the same position that the Industrial Court must decide if the notes of inquiry are accurate and whether the domestic inquiry is valid as decided in the *Bumiputra Commerce* case, in order to determine whether a prima facie case had been made out.

[43] It is an established principle that when the Industrial Court hears the reference under s 20 of the Industrial Relations Act 1967, it is by way of rehearing, to hear the case 'de novo', regardless of whether the domestic inquiry was held or otherwise.

[44] In the case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753; [1995] 1 MLRA 412; [1995] 3 CLJ 344; [1995] 2 AMR 2145, the Federal Court overturned the decision of the Industrial Court in ruling that the omission of the domestic inquiry rendered the employee's dismissal to be void. In quashing the Industrial Court's decision, the Federal Court held:

> Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to being heard to satisfy natural justice and thereby rectify any omission to hold any domestic inquiry. *Indeed, the Minister's reference should be viewed as a hearing de novo by an independent statutory tribunal.* In our view this was a far cry from saying that a statutory or contractual requirement for a predismissal inquiry could be totally ignored in all disputes involving master and servant, even though outside the parameter of s 20.
>
> ...
>
> It was not within the ambit of the reference for the Industrial Court to determine whether Hong Leong ought to be punished for failing to hold a domestic inquiry. The Industrial Court was not competent to declare the dismissal void for failure to comply with the rule of natural justice. *The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry*. We were confident that the Industrial Court as constituted at present was capable of arriving at fair result by fair means on all matters referred to it. *If therefore, there had been a procedural breach on natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the re-hearing by the Industrial Court*. (Emphasis added.)

[45] The decision of the Federal Court in *Wong Yuen Hock* was followed by the High Court in *Ganesan a/l G Suppiah v Mount Pleasure Corp Sdn Bhd* [1997] MLJU 148; [1998] 1 CLJ 637, which also held that:

> Invariably, the hearing before the Industrial Court itself which indeed provides a better and impartial forum for the employee than most domestic tribunals, should be taken as sufficient opportunity for the employee to being heard to satisfy natural justice and thereby rectify any omission to hold any domestic inquiry. *Indeed, the Minister's reference should be viewed as a hearing de nova by an independent statutory tribunal.* In our view this was a far cry from saying that a statutory or contractual requirement for a predismissal inquiry could be totally ignored in all disputes involving master and servant, even though outside the parameter of s 20. (Emphasis added.)

[46] However, the decision in *Wong Yuen Hock* has been distinguished by the High Court in *Bumiputra Commerce Bank Bhd* on the basis that in this case, a domestic inquiry was not held. The learned judge was of the view that the Federal Court case of *Wong Yuen Hock* and *Milan Auto Bhd* did not lay down the principle that the Industrial Court was bound to conduct a de novo hearing where an inquiry had been held.

[47] In a subsequent case, *Plaintree Wood Products Sdn Bhd lwn Mahkamah Perusahaan Malaysia dan satu lagi* [2005] MLJU 672; [2005] 1 LNS 283, the same learned judge again clarified his decision in *Bumiputra Commerce Bank* and concluded that the Industrial Court is not bound by the decision of

domestic inquiry:

> 5. Jelas, asas permohonan pemohon adalah kes *Bumiputra Commerce Sdn Bhd* yang saya putuskan terdahulu. Dengan hormatnya saya berpendapat perkara yang diputuskan di dalam kes tersebut adalah berbeza dengan kes pemohon ini. Di dalam kes *Bumiputra Commerce Sdn Bhd*, apa yang saya putuskan adalah mengenai kegagalan Mahkamah Perusahaan untuk mengambilkira nota keterangan domestic inquiry yang telah dikemukakan sebagai keterangan. Mahkamah Perusahaan di dalam kes itu tidak langsung merujuk kepada nota keterangan domestic inquiry dalam membuat penilaian fakta dan kegagalan itu telah saya putuskan sebagai suatu kesilapan undang-undang. Di dalam kes pemohon ini, keadaan adalah berbeza. Kes pemohon di Mahkamah Perusahaan adalah masih diperingkat pembicaraan. Pada saya, responden kedua adalah bebas untuk membentangkan kesnya ini dan untuk menyokong dakwaan bahawa beliau telah dibuang kerja tanpa alasan yang munasabah. Di pihak pemohon pula, jika terdapat keterangan mengenai domestic inquiry, terpulanglah kepada pemohon untuk mengemukakannya. *Tugas Mahkamah Perusahaan ialah untuk membuat keputusan berpandukan keseluruhan keterangan yang dikemukakan melalui keterangan-keterangan saksi yang dikemukakan oleh kedua-dua pihak. Sudah tentu Mahkamah Perusahaan tidak semata-mata terikat kepada nota prosiding di dalam domestic inquiry.* Jadi Mahkamah Perusahaan adalah tidak silap untuk mengarahkan pembicaraan penuh dijalankan di dalam kes ini. (Emphasis added.)

[48] Added to that, this court in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481; [1997] 1 CLJ 665 has also held that:

> The fact that an employer has conducted a domestic inquiry against his workman is an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse. *The findings of a domestic inquiry are not binding upon the Industrial Court which rehears the matter afresh*. (Emphasis added.)

[49] We are of the considered opinion that both the Industrial Court and the learned judge fell into error when a substantial part of their judgments dealt with the issue of the validity of the domestic inquiry and made a decision that based on the findings of the Inquiry, the university had failed to establish the first charge against the claimant.

[50] In doing so, the Industrial Court had failed to appreciate and consider the evidence given viva voce at the trial and the documents produced at the trial to determine whether misconduct has been made out, independently. Hence, we find that the Industrial Court was procedurally wrong for not considering the evidence at the trial, which warrants appellate intervention.

[51] We are also of the considered opinion that the provisions in the Industrial Relations Act empower the Industrial Court to conduct its own hearing and its primary function is to investigate into the grounds for dismissal.

The Industrial Court may act in an inquisitorial or adversarial, depending on the circumstances. In its determination, it has to have regard for equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[52] Therefore, when the duty of the Industrial Court is to conduct the hearing itself, it defeats its statutory purpose when it should first consider the procedure adopted by the domestic inquiry tribunal to verify its validity and to check the accuracy of the inquiry notes, before it can get on with its own investigation.

[53] Added to that, the reliance on the domestic inquiry will invariably lead to the Industrial Court being influenced by the findings of the domestic inquiry, an inquiry that was held by an employer before dismissing his workman. Such a stand would simply mean that the guilt or innocence of a workman upon a charge of misconduct would be decided not by the Industrial Court, but by the employer himself. This is not the purpose for the setting up of the industrial court, which is a special machinery for the vindication of the rights of workman.

[54] As such, we are of the considered opinion that the Industrial Court should not be concerned with the domestic inquiry held by the employer but to hear the dispute de novo, based on the evidence presented before it.

WHETHER AN ACT OF MISCONDUCT HAD BEEN PROVEN

[55] In any event, if both the Industrial Court and the High Court are minded to accept the findings of the domestic inquiry, the Inquiry has made a finding that on the first charge, even though fraud is not established, the claimant did submit an unentitled claim and hence the Panel recommended no dismissal but a 'reminder penalty'.

[56] We are of the considered opinion that an 'unentitled claim' would fall under General Rules, Part IV, section 1, subsection 1.3(vi) 'being dishonest or conducting oneself in such a manner as to lay oneself open to suspicion of dishonesty'. Therefore, the first charge had been proven based on the domestic inquiry findings. The Industrial Court had made an erroneous finding that since fraud has not been established, the first charge had not been proven. We find that if the first charge had not been proven, the Panel would not have recommended a lighter sentence of 'reminder penalty' against the claimant, instead of a dismissal.

[57] In the Industrial Court, the claimant gave evidence without calling any witnesses, yet the Industrial Court relied on the notes in the domestic inquiry

where he had sought for an informal treatment from the dental doctor, as can be seen from para [33] of the award. Thus the Industrial Court made a finding based on the domestic inquiry findings. Therefore, without giving details on the basis of its findings on the factual matrix of the case, the Industrial Court held that the university had failed to establish the first charge based on fraud. However, the Industrial Court failed to make any finding on the issue of dishonesty, which is the domestic inquiry Panel's finding of an 'unentitled claim'.

[58] The learned judge however, made a finding that 'submitted unentitled claim' tantamount to an act of 'dishonest or having conducted himself in such a manner as to lay him to open suspicion of dishonesty', as defined under subsection 1.3(vi) of the CoBE. However the learned judge then held that for the first charge to stand, there must be a finding of both fraud and dishonesty. His Lordship's finding is as follows:

> [59] The Inquiry Panel clearly decided that R1 did not commit any fraud. It, however, found that R1 had submitted unentitled claim, Although the Inquiry Panel did not state categorically in its finding, but even if this court were to assume that the said 'submitted unentitled claim' tantamount to an act of 'dishonest or having conducted himself in such a manner as to lay him to open suspicion of dishonesty', as defined under subsection 1.3(vi) of the COBE, the first charge was not proven as the misconduct shall comprise both the acts defined under subsections 1.3(v) and (vi) as clearly worded in the charge against R1. On this ground, this court found that the Industrial Court was correct when it concluded that the Inquiry Panel did not find R1 guilty under the first charge.
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> ...
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> '[69] *As I had explained earlier, for R1 to be found guilty of serious misconduct as per the first charge, the elements provided on the said charge are the R1 shall have been found to have committed the fraudulent act and had been found to be dishonest or conducting oneself in such a manner as to lay oneself to open suspicion of dishonesty.*
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> [70] The Inquiry Panel was unequivocally clear that they did not find R1 to have committed fraudulent act. That alone had killed the first charge against R1. The Panel only found that R1 was guilty of submitting claim for which he was unentitled for. *Although it was not mentioned in the finding of Inquiry Panel, this court found that when the Inquiry Panel found R1 to have 'submitted claim for which he was unentitled for and thus R1 had committed misconduct', that tantamount to a finding that R1 had been found to be dishonest or conducting oneself in such a manner as to lay oneself to open suspicion of dishonesty, the second limb of that provision.*
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> ...
>
> [72] But the provision under which R1 was charged for, General Rules, Part IV Section 1 Subsection 1.3(v) and 1.3(vi) of the COBE clearly provided that a person can only be found guilty under his provision when both the first and second limb shall have been proven. As such when the Inquiry Panel only found that the second

limb of that provision is proven against R1, the Inquiry Panel cannot convict R1 on the first charge for the offence of serious misconduct. (Emphasis added.)

[59] The relevant part of the first charge reads as follows:

> You have therefore committed an act of serious misconduct as found under General Rules, Part IV Section 1 Subsection 1.3(v): theft, fraud, misappropriation; and (vi) being dishonest or conducting oneself in such a manner as to lay oneself open to suspicion of dishonesty; of the PETRONAS/ITPSB Code of Conduct & Business Ethics (CoBE). In the event that you are found guilty of the alleged misconduct, you can be imposed with punishment as per Part IV Section 2 of CoBE.

[60] The issue then is whether subsection 1.3(v) must be read conjunctively with subsection 1.3(vi), and therefore the 'serious act of misconduct' must encompass both fraud in subsection 1.3(v) and dishonest conduct in subsection 1.3(vi).

[61] Between subsection 1.3(v) and (vi), there is a punctuation semicolon and the word 'and', that is, 'theft, fraud, misappropriation *and* (vi) being dishonest or conducting oneself ...'. Semicolon is used to separate the subject matter of theft, fraud and misappropriation from the subject matter of dishonest or dishonest conduct.

[62] The role of punctuation comma in a legal provision was decided by the Supreme Court in *Dato' Mohamed Hashim Shamsuddin v Attorney-General, Hong Kong* [1986] 2 MLJ 112; [1986] 1 CLJ 377; [1986] CLJ Rep 89. In this case, the court was interpreting s 16(l) of the Courts of Judicature Act 1964, which states:

> (l) for regulating the taking of evidence before an examiner or on commission or by letters of request, and for prescribing the circumstances in which evidence so taken may be read on the trial of an action.

[63] In His Lordship's judgment, Abdoolcader SCJ pointed out that the punctuation comma after the words 'letter of request' in that provision was significant. According to His Lordship, 's 16(l) ... must be read disjunctively in the light of the comma ... and followed by the word 'and', hence the provision of para (l) of s 16 relating to the regulating of the taking of evidence by letter of request apply equally to civil and criminal proceedings'.

[64] Therefore, we are of the considered opinion that because of the punctuation semicolon and the word 'and', subsection 1.3(v) must be read disjunctively from subsection 1.3(vi). Therefore the 'serious act of misconduct' can either be fraud in subsection 1.3(v) or dishonest conduct in subsection

1.3(vi). Bearing in mind that a fraudulent act is distinct from a dishonest act, both are serious independent acts of misconduct which may form the basis for a dismissal. As such, we find that the learned judge has made an erroneous finding that for the first charge to be sustainable, the claimant must establish both fraud and dishonest conduct.

[65] In the present case, the Industrial Court had accepted the domestic inquiry findings that fraud was not established. This contradicts the learned judge's finding that the domestic inquiry had found the claimant's conduct in submitting a claim for which he was unentitled to, tantamount to a finding that 'R1 had been found to be dishonest or conducting oneself in such a manner as to lay oneself to open suspicion of dishonesty …'. Therefore, we find that the first charge in relation to dishonest conduct in subsection 1.3(vi) had been proven against the claimant.

[66] We are also of the considered opinion that the Industrial Court had only accepted the claimant's explanation but failed to consider the university's version. The university's version, which was not disputed by the claimant, was that the claimant has made a claim for RM95 for a treatment received by his wife. Special attention must be given to the fact that the claim was uploaded into a claim system, whereby prior approval from the claimant's superiors and/or Accounts Department was not required.

[67] Once a claim has been put into the claim system, automatically the process will take place. The trigger here was the receipt submitted by the claimant containing two alphabets of 'Sh' which appeared to be cancelled before the claimant's name was written. Upon checking, AIA found out that the claimant was not entitled to the claim as his wife was the person who received the dental treatment. The claimant's claim was therefore rejected by AIA through its letters dated 15 September 2015 and 22 September 2015. This is an independent finding by AIA. In its letter dated 22 September 2015, AIA stated as follows:

> With reference to your abovementioned claim submitted for dental treatment sought at Klinik Pergigian Mardhiah on May 30, 2015, we noted some discrepancies on the receipt submitted with your claim documents. We contacted the clinic concerned for the necessary clarifications and were informed that the treatment sought at the clinic on that day was for your wife, Sharifah Noorhaliza and not for yourself, as indicted on the receipt and claim form.

[68] It must also be noted that the claimant did not dispute the above facts, either in his letter dated 27 October 2018 in response to the show cause letter, or before the Industrial Court. Having admitted the above stated facts, the claimant, in his defence, stated that he 'tersimpan, terlupa, tiada niat untuk menipu'. This was accepted by the Industrial Court, despite the fact that the

claimant had filled in the claim form, with all the necessary details, including the time of visit specifically as stated 17.45, and this clearly shows that the claimant had knowledge about the claim and cannot in, anyway, be regarded as 'terlupa, tersimpan'. The fact that he had filed the claim in the claim system with the knowledge that the receipt was for the dental treatment for his wife, clearly shows a dishonest act by the claimant.

[69] In fact, the claimant had admitted to the charges in his letter and before the domestic inquiry. The Industrial Court dealt with this issue in para [27] of the award:

> 27. Oleh itu walaupun pihak menuntut telah mengaku bersalah kepada pertuduhan semasa siasatan dalaman dijalankan, beliau masih tidak didapati bersalah oleh panel siasatan dalaman, sebaliknya panel telah memberi peluang kepada pihak menuntut untuk mengemukakan penjelasannya. Beliau telahpun memberi penjelasan dan telah disoal oleh pendakwa dan semua ahli panel berkaitan dengan pertuduhan yang dihadapi olehnya. Setelah mendengar penjelasan daripada pihak menuntut, panel mendapati bahawa pihak menuntut tidak melakukan kesalahan frod dan pertuduhan kedua pula telah digugurkan kerana kekurangan keterangan bukti.

[70] Therefore, it is our considered opinion that the Industrial Court's decision to find the claimant not guilty despite pleading guilty to the charges is based on the domestic inquiry Panel's decision, and not upon assessing the evidence presented at trial. The Industrial Court did not consider the admission with the corresponding documents put forward at the trial to decide whether misconduct has been made out. The Industrial Court totally relied on the Inquiry notes.

[71] We also find that the award did not state that the Industrial Court had considered the evidence, especially the receipt, the claim form, the claim system and the claimant's admission. In fact, the Industrial Court found that the claimant had admitted to the first charge but opted to adopt the findings of domestic inquiry. The Industrial Court found the claimant not guilty despite the claimant admitting to the charge, and this is clearly illegal, irrational and an error of law.

[72] From the above, it is clear that a serious misconduct has been proven which warrants a dismissal. The Industrial Court and the High Court failed to appreciate the above, but had instead relied on the domestic inquiry's findings that fraud was not established and the claimant should be let off with a reminder. In fact, the domestic inquiry did make a finding that the claimant had submitted an unentitled claim, a misconduct which the learned judge

found 'tantamount to a finding that R1 had been found to be dishonest or conducting oneself in such a manner as to lay oneself to open suspicion of dishonesty ...'.

[73] As to whether the misconduct of claiming for an unentitled claim attract a mere reminder or a termination is the province of the employer university. The reasons for the termination can be found in the witness statement of COW2:

> Q7: What are the reasons that the Company had decided to terminate the claimant?
>
> A7: UTP has lost its trust and confidence in the claimant. The claim system of the Company has placed high level of trust on the employees and in the event that the Company finds such a case whereby the employee has put in the claim which he is not entitled to, the Company is left with no other option but to terminate the claimant. Therefore, it is the responsibility of the employee to check thoroughly before submitting any claim and he cannot now turned around and said he did that negligently. The Company has taken consideration that the claimant has served the Company for 8 years and therefore, he has no excuse to say that he has submitted the claim negligently without checking.
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> For UTP, we uphold high integrity and we expect the same from the employees. The claimant has committed such serious misconduct and we have no other option but to terminate him.

[74] In determining whether the claimant should be dismissed for the misconduct, we have to consider whether it is reasonable for the university to dismiss the claimant. In *Harianto Effendy bin Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor* [2014] 6 MLJ 305; [2014] 8 CLJ 821, the Federal Court had applied the English case of *British Leyland UK Ltd v Swift* [1981] IRLR 91 in determining whether it was reasonable or not to dismiss an employee. In so holding the court said as follows:

> The conduct of the appellants after the offence was established must be taken into account in deciding whether it was reasonable to dismiss them or not. In *British Leyland UK Ltd v Swift* [1981] IRLR 91 at p 93 Lord Denning said:
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> > But there is a further point. It is whether the Industrial Tribunal took into account all relevant considerations. It seems to me that they failed to take into account the conduct of Mr Swift after the offence was discovered. He did not come forward and say. 'I am sorry; I made a mistake, I ought not to have done it. I will not do anything of the kind again'. He did not even tell the same story he told to the police officer. He put forward a 'cock and bull' story about his having lent his Land Rover to another man: and the other man had got the tax disc: and it was the other man's fault: and so forth. As to that, the Industrial Tribunal were quite outspoken. They said: 'It is flying in the face of probability to suggest that he and Mr Rawlins were giving a truthful and accurate account'. So there it is. Mr Swift did not 'come clean' when he was found out. He put forward a wholly untruthful and accurate account'. That seems to me to be a most relevant

A consideration for the employers to take into account in deciding whether it was reasonable to dismiss him or not ...

B **[75]** In the present case, once the claimant exhibits dishonesty or lack of integrity, the trust and confidence reposed in him by the university/employer can no longer subsist. In the circumstances, it is reasonable for the university to dismiss the claimant, as integrity is the foundation of education, the very purpose of the university.

C CONCLUSION

[76] In conclusion, we find that the findings made by the Industrial Court were not supported by the facts and evidence which were put forward at the trial. Accordingly, the learned judge's decision to affirm the Industrial Court's award is similarly erroneous. We find that the claimant had committed a D serious breach of duty which amounts to a misconduct which justifies dismissal. As such, we find that the claimant's dismissal was with just cause or excuse. Accordingly, the university's appeal is allowed, and the decision of the learned judge is set aside with costs. We grant an order for the award to be quashed.

E *Appellant's appeal allowed; High Court's order set aside with costs; and award quashed.*

Reported by Dzulqarnain Ab Fatar

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